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No. 94-1334

In the Supreme Court of the United States

OCTOBER TERM, 1994

GUS ALEX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in declining to instruct the jury that it must unanimously agree on which two or more predicate racketeering acts constitute the "pattern of racketeering activity" required for a RICO conspiracy conviction.

2. Whether a RICO conspiracy charge requires proof that the defendant agreed to "personally commit" at least two predicate racketeering acts.

3. Whether the district court erred in prohibiting cross-examination of a government witness about documents obtained from the witness's former attorney.

4. Whether the district court properly departed upward from the guideline range in sentencing petitioner under the Sentencing Guidelines.

5. Whether the district court erred in declining to hold a hearing to determine petitioner's competency to stand trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 32 F.3d 1203. The order of the district court finding petitioner competent to stand trial (Pet. App. 16a-17a) is reported at 789 F. Supp. 953.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1994. A petition for rehearing was denied on November 7, 1994. Pet. App. 49a-50a. The petition for a writ of certiorari was filed on February 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiracy to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d); and conspiracy to commit extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. He was sentenced to 188 months' imprisonment, to be followed by three years of supervised release, and fined $250,000. In addition, petitioner was ordered to forfeit $197,000 and to pay, jointly and severally with co-defendant Nicholas Gio, $376,000 in restitution. Pet. App. 45a-46a.

1. The evidence at trial showed that the "Patrick Street Crew" operated a protection racket in Chicago, Illinois, for the organized crime syndicate known as the "Outfit" between 1983 and 1989. During that period, members of the Patrick Street Crew threatened the owners of small businesses and other individuals with destruction of their property, as well as death and injury to themselves and their families, if they did not make substantial cash payments to the crew. The crew was headed by Leonard "Lenny" Patrick, who dealt directly with some of the victims of the extortion schemes and directed the activities of the crew with respect to the other schemes. Co-defendants Mario Rainone and Nicholas Gio were members of the crew. Pet. App. 1a-2a; Gov't C.A. Br. 3-13.[1]

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[1] Although the government's brief was filed under seal in the court of appeals, a redacted version was publicly filed. Unless otherwise noted, "Gov't C.A. Br." refers to the redacted version of the brief.

Petitioner was Patrick's superior in the Outfit. Patrick was required to obtain petitioner's approval for the crew's extortion activities and to share the profits with petitioner. Petitioner supervised the crew's activities and collected his share of the profits during meetings with Patrick; his position in the crew's hierarchy insulated him from contact with the crew's victims and street-level enforcers. Petitioner's superior was Sam Carlisi, the head of the Outfit. Pet. App. 2a-3a; Gov't C.A. Br. 4-5, 13-20.

2. Petitioner filed a pretrial motion to dismiss the RICO conspiracy count on the ground that it failed to allege that he agreed personally to commit at least two predicate acts of racketeering. Relying on *United States* v. *Neapolitan*, 791 F.2d 489 (7th Cir.), cert. denied, 479 U.S. 939, 940 (1986), the district court denied the motion. Pet. App. 13a-14a.

3. Before trial, one of petitioner's counsel informed the district court that he doubted that petitioner was mentally competent to stand trial. On the government's motion pursuant to 18 U.S.C. 4241(a), the court ordered petitioner to submit to physical, neurological, and psychological evaluations to determine his competency to stand trial. Pet. App. 16a.

After being examined, petitioner submitted medical reports from Dr. Jack Arbit, a clinical psychologist, and Dr. Jacob Fox, a neurologist. Neither report addressed the standard of competency under 18 U.S.C. 4241(d), but Dr. Fox reported that the results of petitioner's cognitive and neurological tests were within normal limits. Pet. App. 7a, 16a; Gov't C.A. Br. 39-41. The government submitted reports from Dr. Howard D. Simon, a neurologist, and Dr. Steven Rothke, a clinical psychologist. The two doctors noted

that petitioner had signs of early senile dementia, but they both concluded that petitioner was capable of understanding the nature and consequences of the proceedings against him and of assisting in his defense. Pet. App. 7a, 16a; Gov't C.A. Br. 41.

After "carefully review[ing]" the reports, the district court found that petitioner was "not presently suffering from a mental disease or defect which renders him mentally incompetent" and that petitioner was "mentally competent, within the meaning of [the statute], to stand trial." Pet. App. 16a-17a. Because there was "no reasonable cause to believe" that petitioner was incompetent based on the medical reports, the court concluded that an evidentiary hearing was unnecessary. *Id.* at 17a.

Petitioner filed a motion for reconsideration. In support of the motion, both defense counsel filed affidavits stating their belief that petitioner could not competently assist in the preparation of his defense. Pet. App. 51a-57a. At a hearing, the district court "question[ed] the propriety of [defense counsel], not being neurologists, attaching affidavits." *Id.* at 19a. The court also believed that the affidavits should be stricken because defense counsel could not "be a witness and an attorney in the case too." *Ibid.* Since "the neurologists from both sides concluded that [petitioner] [was] mentally competent to stand trial," the court denied the motion for reconsideration. *Id.* at 20a. In its written minute order, the court further explained that it had denied the motion because "[t]he affidavits of counsel are in conflict with the credible medical evidence in this case." *Id.* at 18a.

4. Leonard "Lenny" Patrick, the head of the Patrick Street Crew, testified as a government witness at trial pursuant to a plea agreement. During cross-examination, defense counsel sought to impeach Patrick's credibility with documents that had been obtained by subpoena from David Mejia, Patrick's former counsel who had represented Patrick through his guilty plea. The government objected on the ground that the documents were protected by Patrick's attorney-client privilege. Following an evidentiary hearing, the district court concluded that Patrick had not waived his attorney-client privilege with respect to the documents. Pet. App. 21a-26a. The court accordingly refused to allow petitioner "to cross-examine Mr. Patrick or anyone else on those documents that were produced by Mr. Mejia pursuant to subpoena." *Id.* at 22a. The court ordered that the records be sealed and made part of the record for purposes of an appeal. *Id.* at 22a, 26a.[2]

5. Count 1 of the indictment charged petitioner, Patrick, and co-defendants Mario Rainone and Nicholas Gio with a RICO conspiracy, and Count 2 charged Patrick, Rainone, and Gio with a substantive RICO violation. C.A. App. 54-76. Count 2 of the indictment alleged 11 predicate acts of racketeering ac-

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[2] Although defense counsel apparently reviewed the documents after receiving them from Mejia, the government did not have access to the documents, with the exception of one document consisting of handwritten notes by Patrick that was marked as an exhibit during the evidentiary hearing. On appeal, the court of appeals permitted counsel for both sides to review the sealed record of the evidentiary hearing and petitioner's offer of proof, but prohibited them from reviewing the documents themselves. Gov't C.A. Br. (Under Seal) 23 n.15.

tivity that constituted the "pattern of racketeering activity." *Id.* at 68-76. Count 1 alleged that the "pattern of racketeering activity" for the RICO conspiracy "consist[ed] of the eleven acts of racketeering set forth in Count Two of this indictment, which are realleged and incorporated by reference herein." *Id.* at 56.

At trial, petitioner submitted a proposed instruction requiring the jury unanimously to agree on "at least two specific racketeering acts that all of you believe the defendant agreed that some member of the alleged conspiracy would commit" in order to convict petitioner of the RICO conspiracy. C.A. App. 198. The district court refused to give the instruction. Pet. App. 27a-30a. Instead, the court instructed the jury that, in order to find petitioner guilty of the RICO conspiracy, it was required to find that petitioner "agreed that some member of the conspiracy would commit at least two acts of racketeering activity." *Id.* at 34a. The jury returned a general verdict finding petitioner guilty of the RICO conspiracy charged in the indictment. C.A. App. 205.

6. At sentencing, the district court determined that petitioner's offense level under the Sentencing Guidelines was 32 for the RICO conspiracy charged in Count 1. Pet. App. 33a-34a.[3] The court noted that Guidelines § 2E1.1(a) directed it to treat each of the predicate racketeering acts as a separate count of conviction and to group them to determine a com-

[3] The district court "applied the Sentencing Guidelines effective October, 1987 because they were in effect at the time of the commission of the crimes and [were] less onerous to [petitioner] than application of the Sentencing Guidelines effective November 1, 1992 in effect on the date of sentencing." Pet. App. 37a.

bined offense level. Because the jury instructions had not required the jury to find that petitioner conspired to commit every predicate racketeering act in order to convict him of the RICO conspiracy, the court concluded that it "must be satisfied that the Government has proven that [petitioner] is responsible for each underlying act beyond a reasonable doubt" in order to treat it as a separate count of conviction for purposes of the Sentencing Guidelines. *Id.* at 34a-35a. The court "found that it would have convicted [petitioner] of conspiracy to commit * * * seven underlying acts of racketeering" because "credible evidence showed that [petitioner] conspired to commit each of these racketeering acts." *Id.* at 35a. It therefore determined petitioner's offense level for the RICO conspiracy based on only seven of the 11 predicate acts of racketeering activity charged in the indictment. *Id.* at 37a-43a.

The district court also granted the government's motion for an upward departure. Pet. App. 44a. It found that "a two-level increase [in the offense level] was appropriate for the threats made to family members of the victims of the extortions and for [petitioner's] participation in organized crime." *Ibid.* With an offense level of 34 and a criminal history category of I, petitioner's Guidelines range was 151-188 months' imprisonment. *Ibid.*[4] The court sen-

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[4] The district court determined that petitioner's offense level for the Hobbs Act conspiracy was 23. Pet. App. 43a. After applying the grouping rules of Sections 3D1.1 and 3D1.2 to the two counts of conviction, the court applied the highest offense level of the counts in the group (*i.e.*, 32) to the

tenced petitioner to 188 months in prison. *Id.* at 45a.

7. The court of appeals affirmed. Pet. App. 1a-10a. It rejected petitioner's claim that he was deprived of his Sixth Amendment right of confrontation when the district court refused to allow him to cross-examine Patrick with the documents subpoenaed from Patrick's former counsel. *Id.* at 3a-6a. The court found that the district court did not abuse its discretion in ruling that the documents were protected by the attorney-client privilege, because "[e]vidence that the district judge was entitled to credit and did credit established that the notes had been prepared by Patrick at the direction and for the use of his then lawyer, Mejia, that they were in Patrick's case file in Mejia's office when subpoenaed, and that they give Patrick's version of the acts of which the indictment accused him." *Id.* at 4a. After observing that Patrick's credibility had already been impeached during three days of cross-examination, the court found that "[t]he notes [Patrick] had written to Mejia would have added too little to the picture to warrant abrogating the attorney-client privilege." *Id.* at 5a.

The court of appeals likewise rejected petitioner's claim that the district court erred in refusing to hold an evidentiary hearing under 18 U.S.C. 4241 to determine whether he was competent to stand trial. Pet. App. 7a. In light of the expert reports that

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grouped counts pursuant to Guidelines § 3D1.3(a). Pet. App. 44a.

With an offense level of 32 and a criminal history category of I, petitioner's Guidelines range would have been 121-151 months' imprisonment.

had been submitted to the district court, the court of appeals concluded that the district court did not clearly err in finding that there was no "reasonable cause" under Section 4241(a) to believe that petitioner was incompetent to stand trial. Pet. App. 7a.

Finally, the court of appeals upheld the district court's upward departure under the Sentencing Guidelines. Pet. App. 8a-10a. After noting that the 1987 version of the guideline for extortion offenses that was applied by the district court did not provide an adjustment for threats of bodily injury or death, the court concluded that the threats against family members of the victims of the extortion schemes were a proper basis for an upward departure. *Id.* at 8a. The court also held that petitioner's participation in "organized crime" provided a permissible basis for the upward departure. *Id.* at 9a-10a. The court explained that the RICO guidelines were not conceived with sophisticated and long-lasting criminal groups such as petitioner's in mind, and that "[h]ad the guideline range for RICO offenses been set with the Chicago Outfit in mind, it would have greatly overpunished the run of the mill criminal activities that are the routine grist of RICO prosecutions." *Id.* at 9a.[5]

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[5] The court of appeals found that "[t]he other issues relating to guilt are either resolved by decisions of this court that we are not disposed to reexamine or have no possible merit." Pet. App. 8a.

ARGUMENT

1. Petitioner contends (Pet. 12-14) that the jury should have been instructed that it was required unanimously to agree on the two or more predicate racketeering acts constituting the "pattern of racketeering activity" in order to find petitioner guilty of RICO conspiracy. In a related vein, petitioner contends (Pet. 14-16) that he is entitled to reversal of his RICO conspiracy conviction because the jury may have relied on one of the four predicate acts for which the district court found insufficient evidence at sentencing. Neither contention warrants this Court's review.

a. RICO makes it unlawful for any person to conspire to conduct the affairs of an enterprise through a pattern of racketeering activity. See 18 U.S.C. 1962(c) and (d). The statute defines "racketeering activity" to mean "any act or threat involving" specified state crimes, any "act" indictable under specified federal statutes, and certain federal offenses. 18 U.S.C. 1961(1). It further defines "pattern of racketeering activity" to require "at least two acts of racketeering activity" within a ten-year period. 18 U.S.C. 1961(5). In order to constitute a "pattern of racketeering activity," the predicate racketeering acts must be related, and amount to or pose a threat of continued criminal activity. *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989). Thus, RICO requires the jury to find that each predicate racketeering act has a certain characteristic, *i.e.*, that it is part of a "pattern of racketeering activity," but it does not require unanimous agreement as to the specific predicate racketeering acts that make up the "pattern." The

jury's unanimous agreement that there are predicate racketeering acts constituting a "pattern" is sufficient to satisfy that element of the offense. For that reason, petitioner's claim (Pet. 13) that a specific unanimity instruction with respect to the predicate racketeering acts is required in a substantive RICO prosecution under 18 U.S.C. 1962(c) is mistaken.

This Court has consistently recognized that an indictment need not specify what means, among several named, was the method by which the crime was committed and that a jury need not agree upon a single means of commission. See *Griffin* v. *United States*, 502 U.S. 46, 49-51 (1991); *Schad* v. *Arizona*, 501 U.S. 624 (1991) (opinion of Souter, J.). As the plurality explained in *Schad*:

> In these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict."

501 U.S. at 631-632 (opinion of Souter, J.) (quoting *McKoy* v. *North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring)); accord 501 U.S. at 649 (Scalia, J., concurring in part and concurring in the judgment) ("[I]t has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission."). In the case of RICO conspiracy prosecutions, it is sufficient that the jury unanimously agree that the defendant agreed to the commission of at least two predicate racketeering acts and that the predicate racketeering acts constituted a "pattern." The jury need not unanimously agree on which par-

ticular racketeering acts constituted that pattern. Cf. *United States* v. *Cauble*, 706 F.2d 1322, 1345 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984).[6]

b. There is likewise no merit in petitioner's related claim (Pet. 14-16) that his RICO conspiracy conviction must be reversed because the jury may have relied on one of the four predicate acts for which the district court at sentencing found insufficient evidence. In *Griffin* v. *United States*, *supra*, this Court held that a conviction on a multiple-object conspiracy will be upheld if there is sufficient evidence to support at least one object, even if the general jury verdict does not identify which of the objects the jury found. Rather than speculate about how the jury arrived at its verdict, the Court made clear in *Griffin* that it is presumed under those circumstances that the jury convicted on the basis of the ground that was supported by evidence rather than on the ground for which there was insufficient evidence. 502 U.S. at 58-60. See also *Turner* v. *United States*, 396 U.S. 398, 420 (1970). In this

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[6] As petitioner points out (Pet. 13 n.6), the court in *Cauble* held that a failure to instruct the jury that it had to agree unanimously on the RICO predicate racketeering acts did not amount to plain error, but it suggested that giving such an instruction "might have been [the] better practice." 706 F.2d at 1345; see also *Griffin*, 502 U.S. at 51 (trial court may properly exercise its discretion to give a specific unanimity instruction, but the failure to do so does not render a conviction constitutionally invalid). The courts of appeals have generally encouraged the use of special verdicts or special interrogatories in RICO prosecutions. See, *e.g.*, *United States* v. *Ruggiero*, 726 F.2d 913, 922-923 (2d Cir.), cert. denied, 469 U.S. 831 (1984). To our knowledge, however, no court of appeals has held that a specific unanimity instruction with respect to the predicate racketeering acts is required.

case, the RICO conspiracy conviction was supported by sufficient evidence of seven of the 11 predicate racketeering acts. Those acts were sufficient to constitute a "pattern of racketeering activity."

2. Petitioner next contends (Pet. 16-17) that the district court erred in refusing to dismiss Count 1 of the indictment because the RICO conspiracy charge did not allege that he agreed personally to commit at least two predicate racketeering acts. That contention does not warrant this Court's review.

The crime of conspiracy typically requires proof of an agreement whose objective is the commission of one or more unlawful acts. *Braverman* v. *United States*, 317 U.S. 49, 53 (1942). There is no requirement that each conspirator agree that he will himself perform the illegal acts that constitute the conspiracy's objectives. On the contrary, a conspirator may be convicted upon a showing that he "agree[d] to participate in the conspiracy with knowledge of the essential objectives of the conspiracy." *United States* v. *Carter*, 721 F.2d 1514, 1528 n.21 (11th Cir.), cert. denied, 469 U.S. 819 (1984). See *Blumenthal* v. *United States*, 332 U.S. 539, 557 (1947) (law requires only "showing sufficiently the essential nature of the plan and [the conspirator's] connection[] with it").

In accordance with those basic principles of conspiracy law, the RICO conspiracy statute should be construed to require an agreement to participate in the conduct of an enterprise, with the understanding that the enterprise's affairs will be conducted through the commission of at least two criminal acts. There is no reason to believe that Congress intended to impose a more onerous standard under RICO than applies in conspiracy law generally and require each

conspirator to agree to commit specific criminal acts. Indeed, a requirement that each RICO conspirator agree to commit personally the requisite predicate acts would undermine the congressional objective of combatting organized crime because it would have the effect of exempting from coverage of the conspiracy provision those organized crime figures—like petitioner—shrewd enough to insulate themselves from particular criminal acts committed by their colleagues. See *United States* v. *Neapolitan*, 791 F.2d 489, 497-498 (7th Cir.), cert. denied, 479 U.S. 939, 940 (1986).

As petitioner points out (Pet. 16-17), the courts of appeals are divided on that issue. The majority of the circuits require only that a defendant agree with other conspirators that two predicate racketeering acts will be committed pursuant to the conspiracy. In early decisions addressing the issue, the First and Second Circuits stated that a RICO conspiracy conviction requires that the defendant agree personally to commit two predicate crimes. See *United States* v. *Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983); *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir), cert. denied, 469 U.S. 831 (1984). The Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, however, have rejected those two early decisions and have refused to impose such a requirement. See, *e.g.*, *United States* v. *Adams*, 759 F.2d 1099, 1116 (3d Cir.), cert. denied, 474 U.S. 906, 971 (1985); *United States* v. *Pryba*, 900 F.2d 748, 760 (4th Cir.), cert. denied, 498 U.S. 924 (1990); *United States* v. *Joseph*, 781 F.2d 549, 554-555 (6th Cir. 1986); *United States* v. *Neapolitan*, 791 F.2d at 494-498; *United States* v. *Leisure*, 844 F.2d 1347,

1367 (8th Cir.), cert. denied, 488 U.S. 932, 960 (1988); *United States* v. *Tille*, 729 F.2d 615, 619 (9th Cir.), cert. denied, 469 U.S. 845, 848 (1984); *United States* v. *Rosenthal*, 793 F.2d 1214, 1228, modified on other grounds, 801 F.2d 378 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987).[7]

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[7] Contrary to petitioner's claim (Pet. 16), neither the Fifth Circuit nor the Tenth Circuit has definitively resolved the issue. In *United States* v. *Martino*, 648 F.2d 367, 382-383, vacated in part on other grounds, 650 F.2d 651 (5th Cir. 1981), cert. denied, 456 U.S. 943, 949 (1982), the court rejected the defendant's claim that prosecution for a RICO conspiracy and a substantive RICO violation in the same case violated the Double Jeopardy Clause's prohibition on multiple punishments for the same offense. In holding that the RICO conspiracy and the substantive RICO violation were not the "same offense," the court merely observed that "[a] RICO conspiracy charge requires the additional element of agreement; the defendant must have 'objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise *through the commission of two or more predicate crimes.*'" *Id.* at 383 (quoting *United States* v. *Elliott*, 571 F.2d 880, 903 (5th Cir.), cert. denied, 439 U.S. 953 (1978)). As the Eleventh Circuit explained in *United States* v. *Carter*, 721 F.2d at 1529-1531, neither *Martino* nor *Elliott* should be read to require that a defendant agree personally to commit the predicate racketeering acts. Several subsequent Fifth Circuit decisions have taken note of the issue, but have expressly declined to reach it. See *United States* v. *Faulkner*, 17 F.3d 745, 773-774, cert. denied, 115 S. Ct. 193, 663 (1994); *United States* v. *Williams*, 809 F.2d 1072, 1096 n.26, modified on other grounds, 828 F.2d 1, cert. denied, 484 U.S. 896, 913, 987 (1987); *United States* v. *Manzella*, 782 F.2d 533, 537 n.2, cert. denied, 476 U.S. 1123 (1986).

The Tenth Circuit similarly found it unnecessary to resolve the issue in *United States* v. *Killip*, 819 F.2d 1542, cert. denied, 484 U.S. 865, 987 (1987). In that case, the court observed

Although the First Circuit's decision in *Winter* contains some language contrary to the majority rule, the issue petitioner raises here was not presented in that case. The jury in *Winter* was instructed that conviction required an agreement to commit two predicate acts personally. The defendants argued on appeal that a RICO conspiracy requires more—proof that the defendants actually committed two predicate acts of racketeering. The First Circuit rejected that argument. The court's statement that a RICO conspiracy requires an agreement to commit two or more predicate acts personally is therefore dictum. The court had no occasion to consider the sufficiency of an agreement that co-conspirators commit the predicate acts. See 663 F.2d at 1135-1136.

Unlike the First Circuit in *Winter*, the Second Circuit in *Ruggiero* reversed a conviction for RICO conspiracy, but the court's analysis of the RICO conspiracy issue was not necessary to its decision. The issue of the proper construction of Section 1962(d) arose in connection with the appeal of defendant Tomasulo. The indictment charged Tomasulo with

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that it "ha[d] not decided the issue, but because of the trial court's instructions in this case, we do not reach it here." *Id.* at 1548. Subsequently, in *United States* v. *Sanders*, 929 F.2d 1466, 1473, cert. denied, 502 U.S. 846 (1991), the court stated that, "although th[e] issue may be ripe for reconsideration at a future time and upon an opportunity for fuller briefing by the parties, for purposes of this appeal we adopt the rule of law that the defendant must agree to personally commit two predicate acts, not merely agree to the commission of two predicate offenses by any conspirator." Given the tentative nature of the court's holding, and the fact that it expressly decided the issue only "for purposes of this appeal," the issue must be deemed open in the Tenth Circuit.

participating in a RICO conspiracy based on two predicate acts. The Second Circuit decided that one of the two predicate acts did not qualify as an act of racketeering at all. For that reason, the court concluded that Tomasulo's conviction was invalid without regard to whether he had agreed to commit that act himself or had simply agreed that the act would be committed by one of his co-conspirators. In either case, the agreement that he was alleged to have entered included only one of the requisite acts of racketeering and, accordingly, was not a violation of Section 1962(d). See 726 F.2d at 921.

The Court has consistently denied certiorari in cases raising this issue, and there is no reason for a different disposition here.[8] The *Ruggiero* and *Winter* courts did not have the benefit of the other court of appeals decisions that have adopted what has become the majority rule. Indeed, the *Ruggiero* court stated that it considered its construction of Section 1962(d) to be required by "[p]revailing case law." 726 F.2d at 921. Since that time, every circuit to address the issue has ruled contrary to *Ruggiero* and *Winter*. Because of the more recent case law, the First and Second Circuits might well reconsider

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[8] See *Winters* v. *United States*, cert. denied, 113 S. Ct. 83 (1992); *Pryba* v. *United States*, cert. denied, 498 U.S. 924 (1990); *Scotto* v. *United States*, cert. denied, 489 U.S. 1066 (1989); *Wougamon* v. *United States*, cert. denied, 488 U.S. 960 (1988); *Finestone* v. *United States*, cert. denied, 484 U.S. 948 (1987); *Stewart* v. *United States*, cert. denied, 480 U.S. 919 (1987); *Messino* v. *United States*, cert. denied, 479 U.S. 939 (1986); *Neapolitan* v. *United States*, cert. denied, 479 U.S. 940 (1986); *Adams* v. *United States*, cert. denied, 474 U.S. 971 (1985); *Tillie* v. *United States*, cert. denied, 469 U.S. 845 (1984); *Morris* v. *United States*, cert. denied, 469 U.S. 819 (1984).

their decisions when presented with an opportunity to do so.

3. Petitioner renews his contention (Pet. 17-19) that he was deprived of his Sixth Amendment right to confrontation when the district court prohibited the cross-examination of Patrick about the documents obtained from Patrick's former attorney, David Mejia. Petitioner does not directly challenge the finding of both courts below (Pet. App. 4a, 22a, 26a) that the documents obtained from Mejia fell within the scope of the attorney-client privilege.[9] Rather, he contends that his Sixth Amendment right of confrontation overrode Patrick's privilege. The court of appeals correctly rejected that contention.

The Confrontation Clause of the Sixth Amendment guarantees a defendant in a criminal case the right

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[9] Petitioner asserts (Pet. 18) that Patrick's claim of privilege was "questionable" because the government, rather than Patrick, initially raised the objection. Following the evidentiary hearing, however, the district court found that "the attorney-client privilege was never explained to [Patrick] by Mr. Mejia and * * * Mr. Mejia never mentioned any possibility of waiver to Mr. Patrick." Pet. App. 22a. And as the court of appeals noted, Patrick testified at the evidentiary hearing that he did not authorize turning over the documents to petitioner's counsel. *Id.* at 3a; see also *id.* at 26a.

Petitioner also asserts (Pet. 18) that the district court failed to conduct a document-by-document analysis to justify its finding that each of the documents was privileged. The record contradicts that assertion. After the evidentiary hearing, the district court reviewed the documents in camera over the weekend before issuing its final ruling that petitioner would not be allowed to cross-examine Patrick with the documents. See Pet. App. 23a ("In reviewing these documents over the weekend and the case law over the weekend, I want to amplify what I said with regard to the attorney-client privilege.").

"to be confronted with the witnesses against him." That right entitles a defendant on cross-examination to probe the witness's motivation for testifying against the defendant. See, *e.g.*, *Olden* v. *Kentucky*, 488 U.S. 227, 231 (1988) (per curiam); *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678-679 (1986); *Davis* v. *Alaska*, 415 U.S. 308, 316-317 (1974). At the same time, the Court has repeatedly emphasized that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware* v. *Fensterer*, 474 U.S. 15, 20 (1985) (per curiam); see also, *e.g.*, *United States* v. *Owens*, 484 U.S. 554, 559 (1988). Thus, the Court has recognized that trial courts retain "wide latitude" to impose "reasonable limits" on cross-examination designed to impeach a witness. *Delaware* v. *Van Arsdall*, 475 U.S. at 679; see also *Michigan* v. *Lucas*, 500 U.S. 145, 149 (1991); *Davis* v. *Alaska*, 415 U.S. at 316.

The court of appeals did not hold that a defendant's right to effective cross-examination may never override a witness's claim of attorney-client privilege. The court merely held (Pet. App. 3a-6a) that, on the facts of this case, petitioner's right to effective cross-examination was not violated by the district court's limitation on his cross-examination. Thus, as petitioner appears to concede (Pet. 17-18), this case does not present the legal question whether the legitimate interests served by the attorney-client privilege are sufficiently strong to override a defendant's right to effective cross-examination in every case.

There is no merit in petitioner's contention (Pet. 18-19) that his Sixth Amendment right to effective cross-examination was violated on the facts of this

case by the district court's refusal to allow cross-examination on the documents protected by the attorney-client privilege. Patrick was cross-examined for three days on the terms of his plea agreement, the payments he had received from the government for his cooperation, and a series of matters that impeached his credibility, including the making of a false sworn statement regarding petitioner's involvement in the conspiracy. Gov't C.A. Br. (Under Seal) 27. As the court of appeals noted, Patrick admitted that he "had committed perjury on a number of occasions, had bribed politicians and police officers, had engaged in extortion and loansharking, and had committed six murders." Pet. App. 5a. Indeed, Patrick admitted that he was willing to lie on the stand in this case to stay out of jail. *Ibid.* Although petitioner argues (Pet. 18) that the privileged documents provided the only basis to confront petitioner with prior inconsistent statements about the charges in the indictment, the court of appeals properly found that those statements "would have added too little to the picture to warrant abrogating the attorney-client privilege." Pet. App. 5a. Because the jury received sufficient information to make a discriminating appraisal of Patrick's motives for testifying for the government, the Confrontation Clause was not violated when the district court refused to allow cross-examination on the documents protected by the attorney-client privilege. See *Jenkins* v. *Wainwright*, 763 F.2d 1390, 1392-1393 (11th Cir. 1985), cert. denied, 476 U.S. 1164 (1986); *United States ex rel. Blackwell* v. *Franzen*, 688 F.2d 496, 501-502 (7th Cir. 1982), cert. denied, 460 U.S. 1072 (1983).

4. Petitioner also contends (Pet. 19-21) that the district court improperly departed upward from the presumptive Guidelines range.

Under 18 U.S.C. 3553(b), a district court may depart from the Guidelines range only when the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." See *Williams* v. *United States*, 503 U.S. 193, 198 (1992); *Burns* v. *United States*, 501 U.S. 129, 133 (1991). In this case, the district court relied on two independent grounds when it departed upward from the Guidelines range through a two-level increase in petitioner's offense level: the threats made against family members of the victims of the extortion scheme, and petitioner's participation in an organized crime venture. Pet. App. 46a.

Contrary to petitioner's claim (Pet. 20), the court of appeals did not improperly "switch[]" the first ground of departure from threats against the family members of the victims to threats of bodily injury against the victims themselves in order to uphold the departure. Rather, in ruling that "[i]t can make no difference that the threats against the members of the families of the extortion victims were not communicated directly to those family members," the court simply rejected petitioner's argument that a departure was unjustified unless the threats against family members were communicated directly to them. Pet. App. 8a. Because the 1987 version of the extortion guideline, Guidelines § 2B3.2, applied by the district court did not take into account such threats,

the court of appeals properly upheld the departure on that ground.[10]

In any event, the alternative ground relied upon by the district court—petitioner's membership in organized crime—provided a proper ground for a departure. Contrary to petitioner's claim (Pet. 20-21), the mere fact that Guidelines § 2E1.1 provides that the offense level for a RICO offense is the higher of 19 or the offense level applicable to underlying racketeering activity does not preclude a departure based on petitioner's membership in the Chicago Outfit. As the court of appeals noted in expressly rejecting petitioner's claim, Section 2E1.1 applies to all persons convicted of a RICO offense, not just to members of organized crime. Pet. App. 9a. The court pointed out that the Chicago Outfit was "a criminal syndicate of extensive scope and extraordinary durability—one of the oldest and most notorious criminal enterprises in the United States." *Ibid.*[11] Because "[t]he Chicago Outfit is the clearest possible example of a gang operating on such a scale, with such success, over such a long period of time that the dan-

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[10] Section 2B3.2 was subsequently amended to authorize a two-level adjustment in the offense level for "an express or implied threat of death, bodily injury, or kidnapping." See Guidelines § 2B3.2(b)(1) (Nov. 1, 1994); United States Sentencing Comm'n, *Guidelines Manual*, App. C, amend. 366, at 186 (Nov. 1, 1991). As the court of appeals pointed out, "[t]he addition of the adjustment shows that the previous guideline omitted a factor relevant to sentencing under the scheme of the guidelines, and it is precisely (and only) such an omission that is a proper basis for a departure." Pet. App. 8a.

[11] As the court of appeals observed, the leadership of the Chicago Outfit has been traced back to Al Capone. Pet. App. 1a-2a.

ger which it poses to society is not adequately reflected in the guideline range," the court properly concluded that an upward departure was justified. *Id.* at 9a-10a.

5. Finally, petitioner renews his contention (Pet. 21-22) that the district court erred in declining to hold an evidentiary hearing to determine his competency to stand trial. The court of appeals correctly rejected that contention.

There is no merit in petitioner's claim (Pet. 21-22) that the courts below erred in disregarding the affidavits of his lawyers in concluding that there was no "reasonable cause" under 18 U.S.C. 4241(a) to believe that petitioner was incompetent to stand trial. While *Drope* v. *Missouri*, 420 U.S. 162 (1975), noted that "an expressed doubt [as to the defendant's competence] by one with 'the closest contact with the defendant' is unquestionably a factor which should be considered" in determining whether a competency examination should be ordered, the Court made clear that it "[was] not, of course, suggest[ing] that courts must accept without question a lawyer's representations concerning the competence of his client." *Id.* at 177 n.13 (citation omitted). In this case, petitioner had already been examined by four psychological experts before his trial lawyers submitted their affidavits, and none of the experts found him to be incompetent. On the contrary, two experts found that petitioner was competent to stand trial, while the other two did not specifically address the statutory standard to determine competence. Moreover, "even one of the reports submitted on behalf of [petitioner] described his 'neurological and cognitive performance' as falling 'within normal limits.'" Pet. App. 7a. Thus, as the district court noted, the affi-

davits of petitioner's trial lawyers were "in conflict with the credible medical evidence in this case." *Id.* at 18a.[12] In those circumstances, the district court was entitled to conclude that there was no "reasonable cause" to question petitioner's competency to stand trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1995

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[12] Petitioner's reliance (Pet. 21) on *Medina* v. *California*, 112 S. Ct. 2572 (1992), to support his claim is misplaced. In that case, the Court held that it does not violate the Due Process Clause to require a defendant who alleges his incompetence to stand trial to bear the burden of proving so by a preponderance of the evidence. Although the Court noted in passing that "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense" (*id.* at 2580), nothing in *Medina* suggests that the claim of a defendant's lawyer that his client is incompetent is sufficient by itself to require a competency hearing when that claim is contradicted by expert psychiatric evidence.

Petitioner also complains (Pet. 22) that the courts below engaged in a "selective reading" of the medical reports and disregarded information in those reports suggesting his incompetence to stand trial. Those fact-bound claims plainly do not warrant this Court's review.

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